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No. 85-1535

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LUIS MANUEL VEREZ

AND

MILTON VIDAL,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THIS CASE MERITS REVIEW BY THIS COURT.

II. WHETHER THE VIRGINIA SUPREME COURT CORRECTLY HELD THAT PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES JUSTIFIED THE WARRANTLESS ENTRY AND ARRESTS OF PETITIONERS IN THEIR MOTEL ROOM.

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JURISDICTION

The petitioners assert that jurisdiction of this Court is grounded upon 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari at 3.

PRELIMINARY STATEMENT

References to the Petition for Writ of Certiorari will be designated "(Ptn. ___)." References to the appendix of the Petition for Writ of Certiorari will be designated "(App. ___)." References to the trial transcript dated January 10, 1984, will be designated "(Tr. ___)."

STATEMENT OF THE CASE

On November 15, 1983, Luis Manuel Verez and Milton Vidal were indicted by a Hanover County grand jury on charges that on October 3, 1983, they unlawfully and feloniously possessed cocaine with the intent to give, sell or distribute. Petitioners filed motions in the Hanover County Circuit Court to suppress the evidence alleging that they had been subjected to an unlawful search and seizure. (App. 9). On January 10, 1984, a suppression hearing was held, and the court overruled the motions. Petitioners renewed their motions, which were again overruled on January 30, 1984. (App. 10).

On February 6, 1984, Vidal was tried and convicted by a jury in the Circuit Court of Hanover County on the charges. Verez was tried and convicted of the charges on February 13, 1984, by the court without a jury.

Petitioners appealed their convictions to the Supreme Court of Virginia. The appeals, both of which were based on the same set of facts, were consolidated and on November 27, 1985, the court affirmed the convictions. *Verez* v. *Commonwealth,* 230 Va. 405, 337 S.E.2d 749 (1985). After petitioners' request for a rehearing was denied, they petitioned this Court for certiorari review.

STATEMENT OF THE FACTS

As a result of a joint investigation, officers of the Virginia State Police and the federal Drug Enforcement Administration (DEA) had concluded that Luis Manuel Verez was a large-scale cocaine trafficker engaged in the transportation of cocaine in kilogram lots from Florida to Northern Virginia. During the last five years, Verez had sold cocaine periodically to Raymond Cunningham and Russell Chase, residents of Fairfax County. (App. 2). Unknown to Verez, Cunningham and Chase had

become police informants actively cooperating with the DEA by the fall of 1983. (App. 2).

Although no actual transactions had taken place between Verez and the other men since 1980, Verez still occasionally called Cunningham to inquire whether he was interested in a purchase. (App. 2-3). Having informed the DEA of such a call in September 1983, Cunningham and Chase were asked by the DEA to arrange a purchase of cocaine from Verez. (App. 3). They did as asked, and Verez agreed to drive to Northern Virginia to deliver the cocaine to them on September 29 or 30, 1983. Verez "hired" Milton Vidal to drive him from Florida to Virginia. (App. 3-4).

Verez failed to show up on the appointed days, and failed to make any contact with Cunningham or Chase until October 2, 1983. (App. 3). That evening, at about 7:00, Verez called to say he had been delayed, but that he was in Virginia. (App. 3). At 9:00 p.m., Verez called again and told Cunningham that his car had broken down in Ashland and, therefore, if they wanted to complete the drug transaction, they would have to travel to Ashland. (App. 4). Verez said he was staying in a room registered in Vidal's name at the King's Motor Inn, but he did not give a room number. (App. 4). Verez told Cunningham the model and year of his car. (App. 4). Verez stated that he had the cocaine "in hand." From this statement, Cunningham inferred that Verez had the cocaine "around him somewhere" or "in his immediate vicinity." (App. 25).

DEA agents were with Cunningham and Chase when Verez called. (App. 4). The agents had to quickly devise an alternative plan to accommodate the sudden change of events. (App. 4-5). The drug transaction that was to have been completed three days earlier at a rest area in Northern Virginia, was now to be completed in the petitioners' motel room or elsewhere in Ashland in the middle of the night. (App. 5; Tr. 72, 82).

In making the tactical decisions of how to proceed, the agents considered the facts and information known to them. During previous transactions, Verez had been armed and violent, including taking over Cunningham's home at gunpoint. (App. 5; Tr. 74). On some occasions, Verez had other people with him who were armed. (Tr. 70). Verez had consummated drug deals

in numerous ways, including meeting in one location where no drugs were present, insuring that the participants had not been watched or followed, and then moving to another location to pick up the drugs. This *modus operandi* is common with drug dealers. (App. 5). The officers were unsure, from Verez's comment that the drugs were "in hand," whether the cocaine was in the motel room, Verez's car, in some other room, or in an entirely different location. (App. 5).

The officers decided to send Cunningham and Chase into the motel room to determine whether the drugs were in that room, while they maintained surveillance from a distance. If the cocaine were to be produced in the room, Chase would leave on the pretext of returning to his car to pick up some "Clorox" with which to test the cocaine. He would signal the watching officers that the cocaine was actually in the motel room by removing his hat. When Chase returned to the room, the officers would enter when the door was opened to readmit Chase. In the absence of the signal, they would try to follow Verez, Vidal, Cunningham and Chase to wherever they might go to get the cocaine. (App. 6). In order to monitor the transaction as it occurred, the officers concealed a microphone in Chase's clothing but it subsequently malfunctioned and produced little that was intelligible to the listening police. (App. 7).

Cunningham and Chase drove to the motel, inquired at the office as to which room was registered to Vidal, were told that it was room 205, called to be sure that Verez was present, and then drove to room 205. Verez met them outside the room and looked about carefully to determine if they had been followed. (App. 7). The three entered the room where Cunningham and Chase met Vidal. After pleasantries were exchanged, Vidal removed plastic bags containing approximately one kilogram of cocaine from a closet and placed them on a bed. (App. 7-8).

Chase said that he had to return to his car to pick up some "Clorox" to test the cocaine. He left the room, went to his car, and removed his hat. (App. 8). Vidal, who had been watching Chase from the window, opened the door to readmit Chase. Before he could close it, a number of police officers armed with drawn handguns and shotguns followed Chase into the room. (App. 8). The officers were armed because they had received information that these people were carrying guns. (App. 18-19).

The officers knew it was not unusual for narcotics traffickers to be armed. (App. 18, 21). Vidal was temporarily pinned behind the opened door and a shot was accidentally fired into the floor. The cocaine was lying on the bed in plain view. (App. 8-9). While in the motel room, Verez and Vidal signed a form consenting to a search of the room and their car. (App. 9). The search of the car produced a handgun holster and some bullets. (App. 9).

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT MERIT REVIEW BY THIS COURT.

A Writ of Certiorari is not a matter of right but of judicial discretion. It will be granted "only when there are special and important reasons therefor." Sup. Ct. R. 17.1. No such reasons exist here.

This case concerns application of well-settled Fourth Amendment principles to the unique facts and circumstances of what petitioners themselves describe as "this very involved case." (Ptn. 4). Furthermore, petitioners' argument largely turns upon a dispute over what inferences should be drawn from the evidence and whether it was practicable for the police to obtain a search warrant under the particular circumstances of this case. The precise factual issues raised by this case are unlikely to recur.

Petitioners challenge the Virginia Supreme Court interpretation of the record, even regarding whether the trial court had *ruled* that exigent circumstances were established by the prosecution justifying the warrantless entry. Petitioners contend that the ruling "was never made, or was very vaguely and ambiguously made." (Ptn. 18). This Court should not allow itself to be drawn into such a quagmire.

This case will have little, if any, impact beyond its own factual limitations. There do not exist any special reasons or circumstances for reviewing the decision in this case, and no new constitutional rule would be developed by any decision of this Court. Simply put, this is not a case which warrants certiorari review by this Court.

II.

THE DECISION OF THE SUPREME COURT OF VIRGINIA THAT THE WARRANTLESS ENTRY AND ARRESTS IN THIS CASE WERE BASED UPON PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND THE HOLDINGS OF OTHER FEDERAL COURTS.

A. Exigent Circumstances Mandated An Immediate Warrantless Entry Into Petitioners' Motel Room.

Petitioners contend that no exigent circumstances existed which mandated a warrantless entry into their motel room. In affirming the convictions, the Supreme Court of Virginia found the petitioners' contention at odds with prior decisions of this Court, of other federal courts, and with other Virginia decisions.

The Virginia Supreme Court's analysis was correct. The Fourth Amendment protects people against unreasonable searches and seizures, but not those which are reasonable under the circumstances. In *Payton* v. *New York*, 445 U.S. 573 (1980), this Court said:

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. *Absent exigent circumstances,* that threshold may not reasonably be crossed without a warrant.

Id. at 590 (emphasis added). This Court had earlier equated the rights of a guest in a motel room with those of the rightful occupant of a house for Fourth Amendment purposes. *Stoner* v. *California*, 376 U.S. 483, 490 (1964).

Exigent circumstances, however, may justify a warrantless entry. The prosecution bears the burden of justifying such an entry by exigent circumstances. *See Welsh* v. *Wisconsin*, 466 U.S. 740 (1984); *Michigan* v. *Tyler*, 436 U.S. 499 (1978); *United States* v. *Santana*, 427 U.S. 38 (1976); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *McDonald* v. *United States*, 335 U.S. 451, 459-60 (1948) (Jackson, J., concurring).

Many courts have addressed the "exigent circumstances" exception. Some of the factors considered relevant and which might justify a warrantless entry have been: (1) the degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others, including police officers left to guard the site; (4) information that the possessors of the contraband are aware that the police may be on their trail; (5) whether the offense is serious, or involves violence; (6) whether officers reasonably believe the suspects are armed; (7) whether there is, at the time of entry, a clear showing of probable cause; (8) whether the officers have strong reason to believe the suspects are actually present on the premises; (9) the likelihood of escape if the suspects are not swiftly apprehended; and (10) the suspects' recent entry into the premises after hot pursuit. *See, e.g., Welsh,* 466 U.S. at 750; *Tyler,* 436 U.S. at 509; *Warden* v. *Hayden,* 387 U.S. 294, 299 (1976); *Ker* v. *California,* 374 U.S. 23, 40–41 (1963); *United States* v. *Davis,* 785 F.2d 610, 615 (8th Cir. 1986); *United States* v. *Turner,* 650 F.2d 526, 528 (4th Cir. 1981); *United States* v. *Kulcsar,* 586 F.2d 1283 (8th Cir. 1978); *United States* v. *Rubin,* 474 F.2d 262, 268 (3d Cir. 1973); *Dorman* v. *United States,* 435 F.2d 385, 392–393 (D.C. Cir. 1970); *Vance* v. *North Carolina,* 432 F.2d 984, 990 (4th Cir. 1970).

In determining whether exigent circumstances exist in a particular case which are sufficient to overcome the presumption that a warrantless entry is unreasonable, the courts must examine the circumstances as they reasonably appeared to the law enforcement officers at the scene. *See, e.g., Draper* v. *United States,* 358 U.S. 307, 313 (1959); *United States* v. *Manfredi,* 722 F.2d 519, 523 (9th Cir. 1983); *Turner,* 650 F.2d at 529; *Jackson* v. *United States,* 302 F.2d 194, 196–197 (D.C. Cir. 1962); *Taylor* v. *Commonwealth,* 222 Va. 816, 820, 284 S.E.2d 833, 836 (1981), *cert. denied,* 456 U.S. 906 (1982); *Keeter & Bray* v. *Commonwealth,* 222 Va. 134, 141, 278 S.E.2d 841, 846, *cert. denied,* 454 U.S. 1053 (1981). In the present case, the Virginia Supreme Court correctly pointed out:

> The officers are not required to possess either the gift of prophecy or the infallible wisdom that comes only with hindsight. They must be judged by their reaction

> to circumstances as they reasonably appeared to trained law enforcement officers to exist when the decision to enter was made.

Verez, 230 Va. at 411, 337 S.E.2d at 753.

Applying the foregoing principles to the facts of this particular case, the Supreme Court of Virginia correctly found that the Commonwealth had carried its burden of proving exigent circumstances sufficient to justify the warrantless entry into the petitioners' motel room. The officers had been prepared for a drug transaction where the parties were to meet in a public place, a rest area, in Northern Virginia. Under these original plans, the officers could have exercised more control over the situation. However, on the night the transaction was to be completed, Verez called and said his car had broken down. (App. 3). In order to complete the transaction, the informants and law enforcement officers had to drive to the King's Motor Inn in Ashland. (App. 3-4). The officers, assessing the situation, knew from their experience that it was not unusual for "dealers" to meet at one location to "verify the parties" and then move to another location to deliver the drugs. (App. 5). The officers also knew that Verez had previously consummated drug transactions in numerous ways, including meeting the buyers at one location to insure that they were not watched or followed, and then moving to another location where the drugs would be located. (App. 5). The officers had no way of knowing whether Verez's car had actually broken down. Certainly they were not required to accept Verez's explanation for the change in plans at face value. They could have reasonably believed that the change was just another way Verez chose to orchestrate a drug transaction.

Although Verez told Cunningham during the 9:00 p.m. phone call to Northern Virginia that he had the drugs "in hand," the officers and informants did not know if "in hand" meant actually in his hand, within hand's reach, in the immediate vicinity, or where Verez could get to them. Cunningham did not know from Verez's comment whether the drugs would be in the room, in the car, in some different motel room, or in an entirely different location. (Tr. 72). Assuming, *arguendo*, that having the drugs "in hand" literally meant in his hand, the drugs easily

could have been relocated between the time of the call and the informants' arrival in Ashland. Based on their experience and the information they had about Verez, the officers determined that they did not have sufficiently detailed information for a finding of probable cause to obtain a warrant for possession of cocaine with intent to distribute. The officers could not describe with particularity where the drugs were located.

Once in Ashland, Cunningham and Chase discovered which room was registered to the petitioners. Verez met them outside the room and looked about carefully to determine if they had been followed. The officers waiting outside the motel room were confronted with a volatile, unpredictable situation. They knew that Verez had been armed and violent during similar transactions in the past and it was reasonable and prudent to expect the same on this occasion. They also knew that Verez had at least one companion in the room with him who, based on their information, was probably armed. They knew that Verez was extremely watchful and vigilant against police surveillance. The microphone concealed in Chase's clothing was ineffective, and they could not determine, until they received the prearranged signal, whether the cocaine was in the room or concealed elsewhere. Vidal was keeping continuous watch through the window. If he had become suspicious of Chase, there would be a high probability of violence toward Cunningham, Chase, the nearby police and, possibly, other guests in the motel. An armed attempt to escape was likely, as well as a high probability that the evidence, if present in the room, would be quickly destroyed. If the evidence were concealed outside the room, an entry might be fruitless, leading to violence but allowing the contraband to remain undiscovered in the neighborhood.

After Chase gave his signal, prompt action was imperative. Probable cause to arrest was then beyond question, and unless Chase reentered the room with funds to consummate the drug transaction immediately, the dangerous consequences the police contemplated would become imminent. Clearly, exigent circumstances were present which justified the warrantless entry into the petitioners' motel room.

Other courts have reached the same result in cases with facts similar to those in the present case. For example, in *Manfredi,*

the United States Court of Appeals for the Ninth Circuit upheld a warrantless entry into the defendant's hotel room, finding that the DEA agents "had reason to believe these people had a gun and two and a half pounds of cocaine, and at least one of them was likely to be violent." 722 F.2d at 522. The agents also knew that the occupants of the rooms had sent a cohort to deliver cocaine to another room in the hotel. *Id.* The cohort had been arrested. Failure of the emissary to return as expected would inevitably alarm the occupants creating a substantial risk that the remaining cocaine might be destroyed and that an armed escape might be attempted. *Id.*

One of the defendants in *Manfredi* argued that (1) the agents had probable cause to obtain a warrant before the arrest of his "cohort" precipitated the crisis; (2) the emergency arising from these arrests was foreseeable and avoidable; and (3) the destruction of evidence and risk of harm were not certain or probable, but only possible. *Id.* at 523. The Court found that the agents had nothing but verbal assurances that the suspects could provide cocaine and that it was reasonable for the agents to permit the transaction to proceed until delivery of the drugs. *Id.* The Court also found that the agents pursued a reasonable course of action by identifying the suspects, securing the evidence, recovering the drugs and arresting the culprits. *Id.* Finally, as to the defendant's claim that there was only a possibility that the evidence would be destroyed or that the agents would be in danger, the Court said:

> Once armed suspects in a drug transaction have been altered to possible detection, the risk that delay in effecting an arrest will result in the destruction of the contraband and increase the danger of injury to the agents or others cannot be dismissed as merely speculative.

Id.

In *United States* v. *Palumbo*, 735 F.2d 1095 (8th Cir.), *cert. denied*, 105 S.Ct. 332 (1984), the court upheld a warrantless entry into the defendant's hotel room to arrest him for possession of cocaine with the intent to distribute. The original plan was for the informant to go to the defendant's hotel room, get the cocaine sample, and take it to another room where the

"buyer," a detective, was waiting to "complete the transaction." 735 F.2d at 1097. At the last minute, the officers learned via the transmitter on the informant, that a co-defendant intended to accompany the informant to the "buyer's" room. *Id.* Because the "buyer" could not actually give the co-defendant any money, the "buyer"/detective would have to arrest the co-defendant when he arrived. *Id.* The officers feared that Palumbo would become suspicious when the co-defendant failed to return in a short time and would destroy or remove the cocaine before they could obtain a warrant for his arrest. The court found that the officers' fear that Palumbo would become suspicious and destroy the cocaine was reasonable, and created an exigency sufficient to justify the warrantless entry and arrest. *Id.*

In the present case, the exigent circumstances apparent to the law enforcement officers were sufficient to justify the warrantless entry into the petitioners' motel room. The decision of the Supreme Court of Virginia was correct and consistent with the prior decisions of this Court and of other federal courts.

B. Assuming, *Arguendo,* That The Police Had Ample Time To Secure A Warrant After Probable Cause Was Established, The Subsequent Warrantless Entry And Arrests Based On Exigent Circumstances Were Still Valid.

Even assuming that before the exigent circumstances arose there was probable cause to obtain a warrant, the Virginia Supreme Court correctly noted that this did not vitiate the validity of the subsequent warrantless arrest. *Verez,* 230 Va. at 409-410, 337 S.E.2d at 752. This Court stated in *Cardwell* v. *Lewis,* 417 U.S. 583 (1974): "The exigency [necessitating seizure of an automobile] may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation necessitating prompt police action." *Id.* at 596.

In *United States* v. *Hultgren,* 713 F.2d 79, 87 (5th Cir. 1983), the court noted that unlike the nature of the "routine" felony arrest, where a given individual and a distinct crime is involved, the fluidity of an ongoing investigation of the distribution of

narcotics makes obtaining a warrant more difficult to time in the flow of events. In accordance with this Court's decision in *Cardwell,* the court ruled that where police officers are conducting an ongoing investigation, the officers are not required to seek a warrant as soon as probable cause arises. Rather, the officers may legitimately wait in order to gather additional evidence substantiating the crime, to ferret out any hitherto unknown individuals involved in the crime, or to discover any other offenses in which the suspect may be involved. *Hultgren,* 713 F.2d at 87. *See also United States* v. *Webster,* 750 F.2d 307 (5th Cir. 1984), *cert. denied,* 105 S.Ct. 2340 (1985); *Palumbo,* 735 F.2d at 1095; *United States* v. *Mitchell,* 538 F.2d 1230 (5th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977).

In this case, the police officers were involved in an ongoing narcotics investigation. The drug transaction had been delayed for several days, the site of the transaction had changed, and the police officers were unsure where the cocaine was located until informer Chase gave the planned signal. Finally, Verez was known to have been armed and violent during past drug transactions. Under these circumstances, the warrantless entry and arrests of petitioners were valid even if, *arguendo,* the police had had ample time to secure a warrant after probable cause arose.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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